No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY & LIFE ADVOCATES, D/B/A NIFLA, *ET AL.*,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Not all content-based speech regulations are subject to strict scrutiny. 4

A. This Court has rejected strict scrutiny for content-based restrictions in the related context of commercial speech. 4

1. The Court has applied intermediate scrutiny to content-based commercial speech restrictions. 5

2. Content-based commercial disclosure requirements are subject to relaxed scrutiny. 7

B. *Reed* and *Sorrell* do not mandate strict scrutiny for all content-based speech regulation. 10

C. Strict scrutiny for every content-based regulation would have significant adverse consequences. 14

II. Strict scrutiny should not apply to disclosure requirements for providers of professional services. 16

CONCLUSION 24

TABLE OF AUTHORITIES

Cases: **Page(s)**

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 9

Bolger v. Youngs Drug Prods. Corp.,
463 U.S. 60 (1983) 5, 6, 14

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,
447 U.S. 557 (1980) ..... *passim*

Clark v. Jeter,
486 U.S. 456 (1988) 11

Edenfield v. Fane,
507 U.S. 761 (1993) 5

Expressions Hair Design v. Schneiderman,
137 S. Ct. 1144 (2017) 5, 7, 13, 19

Fla. Bar v. Went For It, Inc.,
515 U.S. 618 (1995) 6

Friedman v. Rogers,
440 U.S. 1 (1979) 23

Greater New Orleans Broad. Ass'n, Inc. v. United States,
527 U.S. 173 (1999) 6

Ill. ex rel. Madigan v. Telemarketing Assocs.,
538 U.S. 600 (2003) 23

King v. Governor of N.J.,
767 F.3d 216 (3d Cir. 2014),
cert. denied, 135 S. Ct. 2048 (2015) 17

Legal Servs. Corp. v. Velazquez,
531 U.S. 533 (2001) 19, 20

Locke v. Shore,
634 F.3d 1185 (11th Cir. 2011),
cert. denied, 565 U.S. 1111 (2012) 17

Lowe v. SEC,
472 U.S. 181 (1985) 3, 16, 17

Matal v. Tam,
137 S. Ct. 1744 (2017) 5, 6, 13, 14

Milavetz, Gallop & Milavetz, P.A. v. United States,
559 U.S. 229 (2010) 8, 9

NAACP v. Button,
371 U.S. 415 (1963) 19, 20

Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Howell,
851 F.3d 12 (D.C. Cir.), *cert. denied*,
138 S. Ct. 420 (2017) 17

Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Lynch,
826 F.3d 191 (4th Cir.), *cert. denied*,
137 S. Ct. 459 (2016) 17, 23

Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Castille,
799 F.3d 216 (3d Cir.), *cert. denied*,
136 S. Ct. 558 (2015) 17

Nixon v. Shrink Mo. Gov't PAC,
528 U.S. 377 (2000) 11

Ohralik v. Ohio State Bar Ass'n,
436 U.S. 447 (1978) 5

Pickup v. Brown,
740 F.3d 1208 (9th Cir.), *cert. denied*,
134 S. Ct. 2871, 134 S. Ct. 2881 (2014) 18, 19

Planned Parenthood of S.E. Pa. v. Casey,
505 U.S. 833 (1992).....3, 17, 18, 20, 22, 23

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992)..... 15

Reed v. Town of Gilbert,
135 S. Ct. 2218 (2015)..... 10, 12, 13, 15

Riley v. Nat'l Fed'n of the Blind,
487 U.S. 781 (1988)..... 20

In re R.M.J.,
455 U.S. 191 (1982)..... 6

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995)..... 6

Serafine v. Branaman,
810 F.3d 354 (5th Cir. 2016)..... 17

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011).....10, 11, 12, 13, 14

Stuart v. Camnitz,
774 F.3d 238 (4th Cir. 2014)
cert. denied, 135 S. Ct. 2838 (2015)..... 17

United States v. Carolene Prods. Co.,
304 U.S. 144 (1938)..... 7

United States v. Virginia,
518 U.S. 515 (1996).....

W. Va. State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943)..... 8

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001)..... 13

Williams-Yulee v. Fla. Bar,
135 S. Ct. 1656 (2015)..... 15

Wollschlaeger v. Governor of Fla.,
848 F.3d 1293 (11th Cir. 2017) 19

Wooley v. Maynard,
430 U.S. 705 (1977) 20

Zauderer v. Office of Disciplinary Counsel,
471 U.S. 626 (1985) ..... *passim*

Statutes and Rules:

15 U.S.C. § 1692d(3)–(4) 15

49 U.S.C. § 32908(b) 15

21 C.F.R. § 101.9 15

21 C.F.R. § 101.14 ..... 14, 15

21 C.F.R. § 201.57 15

D.C. R. Prof. Conduct 1.5(b) 20

D.C. R. Prof. Conduct 1.7(c)(1) 20

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, Inc., is a nonprofit consumer advocacy organization that appears on behalf of its nationwide members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen and its attorneys have long been involved in First Amendment cases, particularly those involving the development of commercial-speech doctrine.

Among Public Citizen's interests is preservation of reasonable requirements that providers of goods and services, including practitioners of regulated professions, disclose information relevant to consumers. Increasingly, however, marketplace participants—even those who engage solely in commercial speech—are challenging such requirements on the ground that they are "content-based" and assertedly subject to strict First Amendment scrutiny. Public Citizen believes that the assertion, implicated in this case, that all speech regulations that can be characterized as content-based are subject to strict scrutiny is directly contrary to this Court's precedents.

At the same time, as an advocacy organization itself, Public Citizen is very sensitive to the need to avoid restraints on fully protected advocacy of viewpoints on political and social issues—including advocacy by persons and organizations that may simulta-

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. Counsel for all parties have consented in writing to the filing of this brief.

neously be engaged in providing professional services to members of the public.

Public Citizen submits this brief to assist the Court in assessing the significance of these considerations to the proper outcome of the challenge in this case, which seeks to invalidate factual disclosure requirements applicable to entities that hold themselves out as providing medical services to pregnant women.

SUMMARY OF ARGUMENT

Petitioners' challenge to the California law requiring them to disclose facts about limitations of the medical care provided by their facilities rests heavily on the proposition that the disclosure requirement is a "content-based" regulation of speech, and that content-based regulations are subject to strict First Amendment scrutiny. Pet. Br. 28. That broadly stated proposition is incorrect, and this Court should not endorse it.

In the commercial-speech arena, both longstanding precedents and the Court's most recent pronouncements make clear that content-based restrictions on speech are subject to intermediate rather than strict scrutiny. Moreover, requirements that commercial speakers disclose factual information pertinent to consumers, investors, and regulators are subject to an even more relaxed form of scrutiny and are permissible if they are reasonably related to a government interest and are not unduly burdensome, *see Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)—even though such requirements are inherently "content-based" in the sense that they prescribe the content of the required disclosures.

The commercial-speech setting offers instructive parallels to the regulation of professional service providers at issue here. The considerations that justify relaxed scrutiny of disclosure requirements under *Zauderer* are not solely limited to commercial speakers. Governments have substantial authority to regulate the provision of professional services even by nonprofit or ideologically motivated entities. That authority justifies standards of review similar to those applicable to commercial speech, at least with respect to some aspects of professionals' communications with clients or prospective clients. *See Lowe v. SEC*, 472 U.S. 181, 228–33 (1985) (White, J., concurring in the result); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (lead opinion).

The provision of professional services by ideologically motivated advocacy organizations may involve a mix of fully protected speech, unprotected conduct, and speech that is incidentally affected by the government's exercise of legitimate authority to regulate professional practice. Speech that concerns the nature of the services to be provided and that is material to the client's choice whether to avail herself of those services falls into the latter category. Reasonable disclosure requirements related to those subjects, like disclosure requirements related to purely commercial transactions, should not be subject to a level of scrutiny designed to protect wholly different expressive interests.

Here, the state's disclosure requirements are reasonably related to legitimate interests in ensuring that women seeking pregnancy-related care receive factual information that is highly material to the decision whether to seek care at specific facilities. Under

this Court's precedents, the First Amendment poses no obstacle to such requirements.

ARGUMENT

I. Not all content-based speech regulations are subject to strict scrutiny.

Petitioners' suggestion that this Court's decisions establish that content-based speech regulations—including factual disclosure requirements—are subject to strict scrutiny regardless of the nature of the speech involved is not correct. *See* Pet. Br. 28–31. The Court should, at a minimum, steer clear of repeating petitioners' mantra to avoid upsetting established First Amendment doctrine. More than that, however, the setting in which the Court has clearly and repeatedly called for relaxed scrutiny of content-based regulations—commercial-speech disclosure—has important parallels to this case that call for a similar level of scrutiny here.

A. This Court has rejected strict scrutiny for content-based restrictions in the related context of commercial speech.

This Court has long recognized that restrictions of commercial speech, even if content-based, are subject to intermediate scrutiny, not to the strict scrutiny ordinarily applied to content-based restrictions on fully protected speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980). Disclosure requirements applicable to commercial messages are subject to an even more lenient standard of review, akin to the rational-basis test applicable to commercial regulation generally. *See Zauderer*, 471 U.S. at 651. The Court's most recent decisions bearing on the subject reinforce these longstanding prin-

ciples. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (citing *Central Hudson* and *Zauderer*); *Matal v. Tam*, 137 S. Ct. 1744, 1767 (2017) (Kennedy, J., concurring in part and concurring in the judgment) (recognizing that "content based discrimination" is not of "serious concern in the commercial context").

1. The Court has applied intermediate scrutiny to content-based commercial speech restrictions.

For nearly four decades, the First Amendment standard that applies to content-based restrictions on commercial speech has been clear: The government may regulate such speech where it has "substantial" interests in the regulation, the regulation "advances these interests in a direct and material way," and "the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (citing *Cent. Hudson*, 447 U.S. at 564). This standard—termed intermediate scrutiny or *Central Hudson* review—affords less protection for commercial speech than the strict scrutiny ordinarily applicable to fully protected speech, such as political, literary, artistic, or religious expression.

The "common-sense distinction" between commercial and noncommercial speech stems from commercial speech's "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978) (internal quotation marks omitted). Accordingly, the Court's decisions recognize that "regulation of commercial speech based on content is less problematic" than regulation of content-based noncommercial speech. *Bolger v.*

Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983); *accord Matal*, 137 S. Ct. at 1767 (Kennedy, J., concurring) (citing *Bolger*).

The argument for strict scrutiny of every content-based speech regulation runs counter to a long line of cases in which this Court has applied intermediate scrutiny to content-based restrictions on lawful, non-misleading commercial speech. *See, e.g.*, *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 176, 183–84 (1999) (striking down a statute that forbade broadcast advertising of casino gambling as applied to advertisements in jurisdictions where such gambling was legal); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478, 482, 488 (1995) (invalidating federal law that prohibited labels for beer, but not wine or distilled spirits, from displaying alcohol content); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620, 635 (1995) (upholding rule prohibiting attorneys from sending certain written solicitations to prospective clients that "relate[d] to an accident or disaster involving the person to whom the communication [was] addressed or a relative of that person"); *Bolger*, 463 U.S. at 61, 68–69 (holding unconstitutional as applied a statute that prohibited unsolicited advertisements for contraceptives); *In re R.M.J.*, 455 U.S. 191, 194, 205–07 (1982) (holding unconstitutional a rule that barred attorney advertisements from identifying jurisdictions in which attorneys were licensed).

In each case, the restrictions turned on the "subject matter" of the speech and the identity of the speaker. Yet in each case, the Court held that the restrictions were subject to intermediate scrutiny. Indeed, *Central Hudson* itself addressed a regulation that banned all "advertising intended to stimulate the

purchase of utility services"—an explicitly content-based restriction. *Cent. Hudson*, 447 U.S. at 559 (internal quotation marks omitted).

2. Content-based commercial disclosure requirements are subject to relaxed scrutiny.

In *Zauderer*, this Court held that content-based commercial disclosure requirements are subject to an even less stringent standard of review than laws that prohibit commercial speech based on content. *Zauderer* rests on a fundamental principle governing First Amendment review of commercial-speech regulations: The constitutionally protected interests implicated by commercial-speech regulations that involve disclosure are much less substantial than those implicated by prohibitions on commercial speech. Thus, while prohibitions on commercial speech are subject to a form of "heightened scrutiny"—under the intermediate scrutiny framework articulated in *Central Hudson*—commercial disclosure requirements are sustained if they are "reasonably related" to a legitimate government interest. *Zauderer*, 471 U.S. at 651. The *Zauderer* disclosure standard and the rational-basis standard applicable to "'regulatory legislation affecting ordinary commercial transactions'" are "similarly permissive." *Expressions*, 137 S. Ct. at 1152 (Breyer, J., concurring in the judgment) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938)).

This Court explained in *Zauderer* that the difference in the standards of review rests on "material differences between disclosure requirements and outright prohibitions on speech." 471 U.S. at 650. *Zauderer* recognized that laws compelling individuals to

profess views on "'politics, nationalism, religion, or other matters of opinion'" raise the most fundamental First Amendment concerns. *Id.* at 651 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). But when commercial speakers are required to disclose information about their products or businesses, "the interests at stake ... are not of the same order." *Id.* "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [a commercial speaker's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.*

Disclosure requirements are a preferred form of regulating commercial speech precisely because they "trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." *Id.* These considerations led the Court in *Zauderer* to hold heightened scrutiny in any form (including *Central Hudson*'s intermediate scrutiny) inapplicable to requirements of factual disclosures in commercial advertising, and to limit its review to the most deferential level of constitutional scrutiny. *Id.*

In *Zauderer* and the Court's later decision in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), the legitimate interest that justified disclosure was the "interest in preventing deception of consumers." *Id.* at 253; *Zauderer*, 471 U.S. at 651. But those decisions do not limit application of the *Zauderer* standard to cases where the government interest is related to protecting consumers against deception. The Court in *Zauderer* applied "reasonable relationship" review because commercial speakers'

interest in not disclosing factual information about their products, services, or businesses is only minimally protected by the Constitution. That reasoning compels the conclusion that whenever a law "requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech[.]" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality).

Disclosure requirements subject to the *Zauderer* standard are necessarily content- and speaker-based: They are triggered by advertisements or other commercial speech with specific content, made by particular types of speakers, and they specify the content of the required disclosures. In *Zauderer*, for example, the disclosure requirement applied only to particular speakers (attorneys) and only to speech with particular content (advertisements mentioning contingent-fee representation), and it told attorneys running such ads exactly what they had to say about a client's potential liability for costs. *See* 471 U.S. at 650.

Such content- and speaker-specificity is an inherent feature of disclosure requirements. It would make no sense, for example, to require companies advertising shoes to warn that smoking cigarettes causes cancer. Likewise, cigarette companies are not required to include warnings about the dangers of sugary drinks in their advertisements, and soft-drink advertisements need not disclose EPA-estimated miles-per-gallon figures for cars. Thus, if content- and speaker-based disclosure requirements were necessarily subject to heightened scrutiny, all disclosure requirements would have to face such scrutiny, and *Zauderer* would be a dead letter.

B. *Reed* and *Sorrell* do not mandate strict scrutiny for all content-based speech regulation.

The argument for strict scrutiny of all content-based restrictions hinges on this Court's decisions in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). Those decisions, however, do not step back from the Court's well-established acceptance of lesser scrutiny for content-based commercial-speech regulations.

In *Sorrell*, the Court struck down on First Amendment grounds a Vermont law that prohibited, with limited exceptions, "pharmacies, health insurers, and similar entities from disclosing or otherwise allowing prescriber-identifying information to be used for marketing" and "pharmaceutical manufacturers and detailers from using the information for marketing." 564 U.S. at 563. The Court held that the law imposed a "speaker- and content-based burden on protected expression," *id.* at 571, by allowing the use of information by other entities, such as "private or academic researchers," *id.* at 563, and for non-marketing purposes, such as "educational communications," *id.* at 564. The Court therefore concluded that "heightened judicial scrutiny [was] warranted." *Id.* at 565.

The Court went on, however, to explain that two types of "heightened" scrutiny could potentially apply to the speech at issue: "a special commercial speech inquiry or a stricter form of judicial scrutiny." *Id.* at 571. The Court concluded that it was unnecessary to decide whether the speech at issue was commercial because, even under the less stringent "commercial speech inquiry," the law was unconstitutional. *See id.*

at 571–72 (citing *Cent. Hudson*, 447 U.S. at 566). Far from announcing a new rule, *Sorrell*'s repeated distinction between intermediate scrutiny and the "stricter" standard the Court did not apply supports the continued application of intermediate scrutiny to commercial speech.

Thus, as *Sorrell* makes clear, the phrase "heightened scrutiny" does not necessarily refer to strict scrutiny. *Sorrell*'s application of intermediate scrutiny contradicts any such reading, and many of the Court's other opinions demonstrate that "heightened scrutiny" is a *generic* term indicating a level of scrutiny higher than rational-basis scrutiny, including both intermediate scrutiny and strict scrutiny. For example, the Court's equal protection precedents frequently use the term "heightened scrutiny" to describe the intermediate scrutiny applicable to gender classifications. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533, 555 (1996); *Clark v. Jeter*, 486 U.S. 456, 463, 465 (1988). In the First Amendment area, the Court has similarly referred to the intermediate scrutiny applied to limits on political contributions as a form of "heightened judicial scrutiny." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000).

The Court's opinion in *Sorrell* uses the term "heightened scrutiny" in the same way as these precedents—as a general description of scrutiny above a rational-basis test, not as a synonym for strict scrutiny. *Sorrell* is thus fully consistent with the continued application of intermediate scrutiny to content-based restrictions of commercial speech. Moreover, nothing in *Sorrell* remotely suggests application of heightened scrutiny of any kind, let alone strict scrutiny, to content-based commercial *disclosure* requirements.

Likewise, *Reed* offers no support for universal application of strict scrutiny to content-based regulations. *Reed* struck down a local law that prohibited outdoor signs without a permit but exempted twenty-three categories of signs, including political and ideological signs and temporary directional signs of short duration. *See* 135 S. Ct. at 2224–25. The law did not, however, exempt signs that the plaintiffs—a church and its pastor—sought to display for extended periods to publicize the time and location of upcoming church services. *Id.* at 2225. The Court cited noncommercial-speech cases for the proposition that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226.

The Court cited *Sorrell*, a commercial-speech case, only in defining the "commonsense meaning of the phrase 'content based.'" *Id.* at 2227. The Court explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* (citing *Sorrell*, 564 U.S. at 565). The Court thus found that the town ordinance in *Reed* was content-based because it "single[d] out specific subject matter for differential treatment." *Id.* at 2230. The Court then applied strict scrutiny to the ordinance as a content-based regulation of fully protected, noncommercial speech. *Id.* at 2231.

Critically, *Reed* did not hold—or even discuss the possibility—that strict scrutiny would apply to content-based commercial-speech restrictions. Had the Court intended to overrule its many decisions apply-

ing intermediate scrutiny to content-based commercial speech restrictions, its opinion would undoubtedly acknowledge such an important aspect of the decision. This Court, like Congress, "does not ... hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). *Reed* provides no hint that it is concealing such an elephant. Indeed, the Court's opinion does not use the term "commercial speech" even once. Similarly, any suggestion that *Reed* alters the standard for *disclosure* requirements is untenable, as such requirements were not at issue in the case, and the Court's opinion does not discuss them.

That *Reed* and *Sorrell* do not sweep so broadly as to require strict scrutiny of any content-based speech restriction is confirmed by this Court's subsequent decisions in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, and *Matal v. Tam*, 137 S. Ct. 1744. *Expressions* concerned a challenge to a New York statute prohibiting merchants from imposing surcharges on consumers who paid with credit cards. The Court determined that the law regulated speech rather than conduct, but did not determine whether it was properly viewed as a speech *prohibition* or a requirement that prices be *disclosed* in a particular way. *See* 137 S. Ct. at 1151 & n.3. Under either view, the law was "content-based" in the sense that its application either prohibited or required speech with particular content. Nonetheless, the Court's opinion does not suggest that the law might be subject to strict scrutiny. Rather, the Court remanded the case for consideration of the law either under *Central Hudson* intermediate scrutiny (if it was ultimately determined to be a speech restriction) or *Zauderer* (if it was determined to be a disclosure requirement). *See id.* at 1151.

Matal concerned a federal statute prohibiting registration of offensive trademarks. Viewed as a speech restriction (as the Court determined it to be), it, too, was undoubtedly content-based. But neither the Court's lead opinion, joined in relevant part by four Justices, nor the opinion of Justice Kennedy (also representing the views of four Justices) held that the law was subject to strict scrutiny solely because it was content-based. The lead opinion applied the *Central Hudson* standard to the law and held it unconstitutional because the interest in suppressing socially offensive speech is not legitimate. 137 S. Ct. at 1764. The opinion of Justice Kennedy (*Sorrell*'s author) applied strict scrutiny because the law was *viewpoint-based*—that is, because it regulated speech because of disagreement with its message. At the same time, that opinion reiterated the point that, by contrast, "content based discrimination" is not "of serious concern in the commercial context." *Id.* at 1767 (citing *Bolger*, 463 U.S. at 65, 71–72).

C. Strict scrutiny for every content-based regulation would have significant adverse consequences.

Applying strict scrutiny to content-based commercial-speech restrictions would risk devastating consequences for the government's ability to adopt commonsense marketplace regulations. Regulations of commercial speech typically apply to specific market participants, such as food manufacturers, debt collectors, and drug companies, and they deal with problems unique to industries in which those participants operate. For example, federal law limits the circumstances in which food manufacturers can make claims about health benefits of their products, 21 C.F.R.

§ 101.14, or advertise the addition of vitamins to infant formula, *id.* § 107.10(b). It forbids debt collectors from advertising the sale of a debt to coerce a debtor to pay it, and from publishing lists of consumers who refuse to pay debts. 15 U.S.C. § 1692d(3)–(4). If content-based commercial-speech restrictions are subject to strict scrutiny, all these restrictions and numerous other useful, longstanding provisions might have to satisfy such scrutiny, on the theory that they apply "to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227.

In the disclosure context, too, the government frequently mandates speech on a particular subject and requires that commercial actors use specific language. For example, vehicle manufacturers must label, in accordance with Environmental Protection Agency rules, each vehicle with its average miles per gallon of fuel. 49 U.S.C. § 32908(b). Drug manufacturers must include "black box" warnings on labels of certain drugs to emphasize particular hazards. 21 C.F.R. § 201.57. And food manufacturers must disclose nutritional information about their products. *Id.* § 101.9.

The government would have a much higher burden to justify basic rules like these if they were subjected to strict scrutiny. It "is the rare case" in which the government "demonstrates that a speech restriction is narrowly tailored to serve a compelling interest," as required to satisfy strict scrutiny. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015) (citation omitted). Indeed, the very point of strict scrutiny is to render laws subject to it "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Applying strict scrutiny to con-

tent-based commercial-speech restrictions could obliterate many longstanding laws and regulations that are critical to the protection of consumers and the marketplace.

II. Strict scrutiny should not apply to disclosure requirements for providers of professional services.

Considerations similar to those in the commercial-speech realm also justify the application of less stringent scrutiny to certain types of regulation directed at persons or entities that offer to provide professional services to members of the public—even if the regulation can be described as content-based and the services are provided on a nonprofit basis and are related to the provider's ideological or advocacy mission. In particular, factual disclosure requirements that relate to the nature of the services to be provided and are material to the client's decision whether to enter into a relationship should not be subject to strict First Amendment scrutiny.

Providers of professional services, no less than commercial speakers, are subject to the government's regulatory authority—authority that is "not lost whenever the practice of a profession entails speech." *Lowe v. SEC*, 472 U.S. at 228 (White, J., concurring in the result). The "personal nexus between professional and client" that exists when a provider of professional services "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in light of the client's individual needs and circumstances" is one marker that helps define when government regulation is legitimately aimed at the professional relationship rather than at fully protected speech as such. *Id.* at 232. Where such a relation-

ship is present, the government may exercise its authority in ways that have the effect of regulating speech with particular content (for example, speech constituting medical, legal, or investment advice).

Indeed, the government may require a license to engage in professional activities involving speech without implicating strict First Amendment scrutiny, even where the licensing of speech itself, or of the press, would otherwise be subject to the most stringent First Amendment scrutiny. *See id.* at 229–30; *see, e.g.*, *Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Howell*, 851 F.3d 12, 19–20 (D.C. Cir. 2017); *Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Lynch*, 826 F.3d 191, 195–96 (4th Cir. 2016); *Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Castille*, 799 F.3d 216, 220–21 (3d Cir. 2015). Thus, although regulations of "professional speech" are inherently applicable to speech defined by its subject matter, the appellate courts generally agree that such regulations, like commercial-speech regulations, are not necessarily subject to strict scrutiny.[2]

As in the realm of commercial speech, disclosure requirements applicable to providers of professional services are properly subject to a level of scrutiny *less* stringent than that applicable to requirements that directly restrain speech. Thus, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, this Court in-

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[2] *See, e.g.*, *Howell*, 851 F.3d 12, 19–20; *Serafine v. Branaman*, 810 F.3d 354, 359–60 (5th Cir. 2016); *Castille*, 799 F.3d at 220–21; *Stuart v. Camnitz*, 774 F.3d 238, 247–48 (4th Cir. 2014); *King v. Governor of N.J.*, 767 F.3d 216, 229–32 (3d Cir. 2014); *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011).

voked the government's authority to subject "the practice of medicine ... to reasonable licensing and regulation," 505 U.S. at 884 (lead opinion), when it upheld the requirement that physicians providing abortions give patients information about the risks of abortion and childbirth, the effects of abortion on the fetus, and the availability of financial support for alternatives to abortion. *See also id.* at 966–67 (opinion of Rehnquist, C.J.). The Court did not subject those requirements to heightened scrutiny, but required that they be "reasonable," *id.* at 885–85 (lead opinion), or "rationally related" to a state interest, *id.* at 967 (opinion of Rehnquist, C.J.)—a standard similar to that applied to commercial speech under *Zauderer*.

Where an organization is engaged both in providing professional services and in ideologically based advocacy—and where it views offering its professional services as a means of advancing its advocacy interests—determining where legitimate regulation of a profession stops and presumptively unconstitutional regulation of fully protected speech begins requires care. The activities of professionals may be viewed as falling "along a continuum" between fully protected speech and unprotected conduct. *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014). "At one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest." *Id.*

By contrast, speech "within the confines of the professional relationship" falls at "the midpoint of the continuum." *Id.* at 1228. Some such speech may have very substantial First Amendment protection—for example, a lawyer's advocacy of a nonfrivolous legal position—but the government may nonetheless regu-

late the competence of the professional's advice and require that it be in the best interests of the client. *See id.* And the government has considerable leeway to require the professional to disclose information about the nature and terms of the relationship and the existence and implications of alternative courses of action. *See id.*

At the end of the continuum furthest from speech regulation are limits on professional conduct that prohibit professionals from acting without a license or from engaging in particular prohibited conduct (such as ordering administration of an illegal drug), although such regulations necessarily have an impact on speech. *See id.* at 1229; *cf. Expressions*, 137 S. Ct. at 1152 (Breyer, J., concurring in the judgment) ("[V]irtually all government regulation affects speech. Human relations take place through speech.").

Regulation of professional services offered by advocacy organizations thus may run afoul of the First Amendment when it aims directly at advocacy itself. For example, in *NAACP v. Button*, 371 U.S. 415 (1963), the Court held that the First Amendment does not permit application of legal ethics rules that prohibit in-person solicitation of clients to an organization that seeks to engage in advocacy through litigation for noncommercial purposes. And in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the Court held that attempts to prevent lawyers from engaging in particular forms of advocacy on behalf of clients (specifically, offering legal representation to challenge welfare laws) violated the First Amendment. *See also Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1309 (11th Cir. 2017) (applying intermediate scrutiny to strike down a statute limiting "what

[a] practitioner could say or recommend to a patient or client").

These principles, however, do not excuse professionals engaged in nonprofit advocacy from all forms of regulation that may affect the content of their speech. In particular, nothing in *NAACP v. Button* or *Velazquez* exempts such professionals from obligations to disclose material information concerning the nature and terms of their representation. Nor do those decisions subject such disclosure obligations to any form of heightened First Amendment scrutiny. Nonprofit lawyers, for example, like for-profit lawyers, are required to disclose conflicts of interest and inform clients of the terms under which their services are being provided. *See, e.g.*, D.C. R. Prof. Conduct 1.5(b), 1.7(c)(1).

Similar disclosure requirements are, under this Court's decision in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), subject to stringent First Amendment scrutiny as compelled speech if applied to speakers when they are engaged *solely* in fully protected speech, such as charitable solicitation. *See id.* at 796–97. But the same result does not follow when disclosures are mandated as part of the formation of a professional relationship or the provision of services within it. As the lead opinion in *Casey* explains, such disclosure requirements in the context of the "reasonable licensing and regulation" of a profession do not share the "constitutional infirmity" that attaches to compelled speech under such decisions as *Wooley v. Maynard*, 430 U.S. 705 (1977). *Casey*, 505 U.S. at 884. Like the regulation at issue in *Zauderer*, such requirements do "not attempt[] to 'prescribe what shall be orthodox in politics, nationalism, religion, or other

matters of opinion or force citizens to confess by word or act their faith therein.'" 471 U.S. at 651.

The imposition of reasonable disclosure requirements on organizations that offer medical or medically related services is no more problematic than the legal-services disclosure requirements discussed above, even if the organizations subject to the requirements offer their services to advance their advocacy of an ideological position on the subject of abortion or any other matter of controversy. Surely, for example, strict scrutiny would not be required if petitioners were to challenge the requirement that providers of medical care provide patients with factual information about their privacy rights under the Health Insurance Portability and Accountability Act (HIPAA)—even if, as part of their ideological mission, petitioners objected to HIPAA privacy rights and advocated their elimination.

The same result should obtain here. The challenged law does not prevent petitioners from offering services that are shaped and limited by their advocacy of a position on abortion. It does not prevent them from presenting their views on abortion to the public or to clients of their facilities. It does not require them to say anything that amounts to advocacy of abortion or that contradicts their positions with respect to abortion. Rather, the law requires only the provision of factual information relevant to their potential clients.

First, as to an unlicensed facility, the disclosure is no more than that the facility does not have a license—a statement of fact that, by definition, cannot be subject to debate because the disclosure requirement would not apply if the statement were not true.

Such information bears a reasonable relationship to the state's interest in fostering the ability of its residents to make informed choices among healthcare providers. Whether a facility that appears to offer health services is in fact a licensed clinic where care is provided by or under the supervision of a doctor or other licensed professional is of obvious relevance to individuals who seek care. Indeed, petitioners do not really argue otherwise, but only assert that the interest is not compelling, Pet. Br. 51–53, or could be pursued through other, less effective means, Pet. Br. 57—points relevant only if strict scrutiny applied.

Second, as to a licensed facility, the disclosure is that the full range of services not provided by the facility (including abortion) are available elsewhere, that public financial support may be available for them, and that more information is available from the county social services offices. Much as petitioners might wish to avoid providing this information, it is indisputably factual. And a person considering whether to seek care at a facility that has chosen, for whatever reason, to limit the services it offers would reasonably want to know whether more comprehensive services are available, and affordable, elsewhere. The required disclosure of availability of "state-funded alternatives," in particular, is "relevant, accurate, and non-inflammatory" and thus "rationally related to the State's legitimate interest" in ensuring that health care choices are "truly informed." *Casey*, 505 U.S. at 968 (opinion of Rehnquist, C.J.).

Petitioners' suggestion that the government's legitimate interest is limited to ensuring informed consent to *surgical procedures*, Pet. Br. 46–49, is unsupported by reason or precedent. The government's in-

terest in fostering informed choice is not confined to any particular type of medical services (or, indeed, to medical services as opposed to other types of services or products). *See Friedman v. Rogers*, 440 U.S. 1, 8 (1979). In addition, as in *Casey*, that petitioners object to providing the information because it might make a difference to some women "only demonstrates that this information ... [is] relevant to a woman's informed choice." *Casey*, 505 U.S. at 968–69 (opinion of Rehnquist, C.J.). Finally, the disclosure does not require petitioners to contradict their advocacy positions, which do not involve attempts to mislead the public into falsely believing that abortion and other reproductive health services are unavailable or that they are not publicly funded in California.[3]

In sum, this is not a case where the government has attempted "to control public discourse through the regulation of a profession." *Lynch*, 826 F.3d at 196. The state has not limited or attached disclosure requirements to the mere dissemination of "information from pro bono advocacy groups." Pet. Br. 47–48. Rather, it has required organizations offering medical services to make factual disclosures of information relevant to the choice whether to seek such services from them or from another provider. The disclosures fall well within the range of the kinds of legitimate regulations of professional service providers that do not trigger strict First Amendment scrutiny.

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[3] If petitioners' advocacy attempted to attract clients by denying that public programs providing reproductive health services were available in California, the First Amendment clearly would not prevent correction of such misrepresentations. *See Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600 (2003).

The Court in this case need not attempt to provide a comprehensive set of answers to the many First Amendment issues that may arise when governmental attempts to regulate the provision of professional services have some impact on the content of speech. Still less should it make sweeping generalizations about strict scrutiny of content-based regulations that could extend beyond the context of this case into the area of commercial speech. In the narrow circumstances here, where a state has imposed a factual disclosure requirement applicable to organizations that operate facilities held out as providing medical services, the Court should decline the invitation to apply strict scrutiny and uphold the challenged law as a reasonable measure rationally related to the interest in informing potential clients of facts relevant to their choices of care providers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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